E-Filed Document Jun 7 2016 15:14:07 2016-IA-00442-SCT Pages: 39

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2016-IA-00442-SCT

PHILIP A. GUNN, SPEAKER OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES — **APPELLANT**

v.

REPRESENTATIVE J.P. HUGHES, JR. — **APPELLEE**

On Interlocutory Appeal
From the Circuit Court of Hinds County, Mississippi
First Judicial District

BRIEF OF APPELLANT

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STATEMENT OF ISSUES

By *en banc* order of May 9, 2016, R. 37, R.E. 29,[1] this Court granted the petition for interlocutory appeal filed on March 24, 2016, by the Honorable Philip A. Gunn, Speaker of the House of Representatives, against Representative J. P. Hughes, Jr., who had secured a temporary restraining order against the Speaker from the Circuit Court for the First Judicial District of Hinds County, the Honorable Winston Kidd presiding. The Circuit Court's order purported to require the Speaker, "consistent with Article 59 [*sic*] of Mississippi Constitution, [to] read or cause to be read all bills presented to the House of Representatives in a normal speed and audible level comprehensive lever [*sic*]." R. 8, R.E. 7.

This Court's order granting the interlocutory appeal instructed the parties to address "(1) whether the judiciary has jurisdiction over this dispute in light of Sections 1 and 2, Article 1 of the Mississippi Constitution, and/or (2) whether this Court should refrain from exercising its jurisdiction over the issues raised in this matter." R. 37, R.E. 29. In the process, the parties were instructed to discuss the cases of *Hunt v. Wright*, 70 Miss. 298, 11 So. 608 (1892), and *Tuck v. Blackmon*, 798 So. 2d 402 (Miss. 2001).

As required by M.R.A.P. 5(b), Speaker Gunn's petition listed the following questions:

> 1. Whether an *ex parte* temporary restraining order must be reversed where the order itself fails to satisfy the requirement of M.R.C.P. 65(b) that it "shall define the injury and state why it is irreparable and why the order was granted without notice," particularly where the applicant has failed to show "by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party can be heard in opposition," and he fails to "certif[y] to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required."
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> 2. Whether any relief, whether by temporary restraining order or preliminary injunction, is precluded under *Tuck v. Blackmon*, 798 So. 2d 402 (Miss.

[1] The Clerk's papers are cited in the form "R. [page]." There are no hearing transcripts or separate exhibits in the appeal record. The record excerpts required by M.R.A.P. 30 are cited in the form "R.E. [page]."

2001), for lack of irreparable injury where the applicant has failed to allege any ignorance, confusion, or misunderstanding of the bills being read on the floor of the House pursuant to Miss. Const. Art. 4 § 59 (1890), and where the record affirmatively shows that each Member has full access to the text of each bill as it is being read.

3. Whether the granting of either a temporary restraining order or a preliminary injunction violates the separation of powers doctrine, as explained in *Tuck v. Blackmon*, where it has not been alleged and cannot be proven that the Speaker's application of § 59 is being done "in a manifestly wrong manner which does critical harm to the legislative process." 798 So. 2d at 407.

Speaker Gunn believes that the two issues identified by this Court's order constitute aspects of the separation of powers question identified as the third question in his petition. His brief therefore begins by addressing the two questions identified in this Court's order. The first two questions presented in Speaker Gunn's petition are consolidated in Part III of the Argument, addressing the procedural and substantive deficiencies of the temporary restraining order issued by the Circuit Court.

Accompanying this Court's *en banc* order of May 9, 2016, was a separate statement by Justice King, joined by Justice Kitchens. R. 39, R.E. 31. That statement raised seven questions that the parties were advised to address:

1. Does the Speaker of the House have the authority to determine constitutional issues?

2. If so, what is the source of the Speaker's authority to determine constitutional issues?

3. What is the purpose, or what are the purposes, of that portion of Article 4, Section 59, that requires that a bill be read in full upon the demand of any member? Miss. Const. art. 4, § 59.

4. What authority can be cited that supports your opinion as to the purpose, or those purposes, that you have identified?

5. Did other methods exist by which the House could comply with the dictates of Article 4, Section 59, and still responsibly attend to legislative business?

6. If there are other methods by which the House could have complied with the dictates of Article 4, Section 59, and still have responsibly attended to legislative business, what are they?

7. If there are no other methods by which the House could have complied with the dictates of Article 4, Section 59, and still have responsibly attended to legislative business, why not?

R. 39-40, R.E. 31-32. These questions are addressed during the course of Part II of the Argument.

STATEMENT OF ASSIGNMENT

As noted by entry on this Court's docket on March 24, 2016, this case has already been retained by the Supreme Court.

STATEMENT OF THE CASE

At issue in this expedited interlocutory appeal is the *ex parte* entry of a temporary restraining order by the Circuit Court for the First Judicial District of Hinds County against the Speaker of the Mississippi House of Representatives. R. 8-9, R.E. 7-8. The TRO was entered without notice to the Speaker after a Member of the House of Representatives filed with the Circuit Court a petition seeking a TRO and preliminary injunction or, alternatively, a writ of mandamus against Speaker Gunn to require the reading of bills before the House in a manner he believed to be compelled by the Mississippi Constitution.

On March 23, 2016, while the House was in session, the Honorable J. P. Hughes, Jr., Representative of District 12, filed a petition naming "Mississippi State Representative House Speaker, Philip A. Gunn," as respondent. R. 3, R.E. 3. Representative Hughes asked the Court to direct Speaker Gunn, when requested to read bills upon the demand of House Members as set forth in Miss. Const. art. 4, § 59 (1890), to ensure that the bills "be read at a speed and audible level of normal comprehension by each Representative within the House chamber." R. 5, R.E. 5.

As set forth in the petition, Representative Hughes's dispute with the Speaker concerns the use of an electronic device to read bills when requested by a House Member. R. 4-5, R.E. 4-5.

According to Representative Hughes, the device is "set on the highest speed adjustment . . . such that the same is being read artificially and so quickly that no human ear nor mind can comprehend the words of the bills." R. 5, R.E. 5. Although the petition purports to "incorporate[] . . . by reference" the Internet broadcast of House proceedings, R. 5, R.E. 5, no audio recording appears in the record.

That same day, at 4:15 p.m., R. 9, R.E. 8, without giving notice to Speaker Gunn, the Circuit Court granted a temporary restraining order which purported to require Speaker Gunn to procure the reading of "all bills presented to the House of Representatives in a normal speed and audible level comprehensive lever [*sic*] so that each Member of the House of Representatives has an opportunity to hear and understand each word of such properly requested reading." R. 8, R.E. 7. The order also set a hearing for March 28, 2016. R. 8-9, R.E. 7-8.

On March 24, 2016, Speaker Gunn filed in the Circuit Court a motion to dissolve the temporary restraining order. R. 10-27, R.E. 9-26. Attached as an exhibit to the motion to dissolve was an affidavit of Andrew Ketchings, Clerk of the House of Representatives, paragraph 3 of which provided:

> At the beginning of the term every Member of the House, by taxpayer expense, is offered either a laptop computer or an iPad for purposes of access to the Internet. This technology is offered to give legislators a platform to research legislation, to read bills, and to do official work of the House. Every Member of the House accepted and received either a laptop computer or an iPad, except for the Speaker and Speaker Pro Tempore. The current text of every bill is available online at all times. All Members therefore have immediate access to the text of every bill as it is being read in the House.

R. 16-17, R.E. 15-16. Paragraph 4 of the affidavit added that Members are entitled to hard copies of the bills by request. R. 17, R.E. 16.

Mr. Ketchings also stated that, "[u]nder the Rules of the House, the deadline for passage of all bills is midnight this coming Wednesday, March 30, 2016," and that "there are presently 96 appropriation and general bills awaiting action on the floor of the House." R. 17, R.E. 16.

Unable to secure a hearing before the Circuit Court, Speaker Gunn filed with this Court on March 24, 2016, his petition for interlocutory appeal by permission, or in the alternative for extraordinary writ of prohibition or mandamus. On the same day, he filed a separate motion for stay of the enforceability of the temporary restraining order and a stay of all proceedings in the Circuit Court. This Court ordered the filing of a response, and Representative Hughes filed his response that same day.

On the evening of March 24, 2016, this Court filed an order, R. 28-29, followed shortly by a corrected *en banc* order, R. 30-31, R.E. 27-28. The corrected order provided that the temporary restraining order "is hereby dissolved and all proceedings in the circuit court in this matter are hereby stayed until further order of this Court." R. 30-31, R.E. 27-28. Thereafter, this Court on May 9, 2016, granted Speaker Gunn's petition for interlocutory appeal and ordered an expedited briefing schedule. R. 37-38, R.E. 29-30.

SUMMARY OF THE ARGUMENT

The very first section of the Mississippi Constitution provides that the courts shall exercise only "those [powers] which are judicial." Miss. Const. art. 1, § 1 (1890). This Court has recognized that not all disputes arising between citizens are subject to resolution by the judicial power. In particular, the Constitution assigns legislative powers to the Legislature, and this Court has repeatedly refused to interfere with the Legislature's power to control its internal affairs. In *Hunt v. Wright*, arising just after the adoption of the Constitution of 1890, this Court refused to investigate whether statutes had been adopted consistent with rules of procedure set forth in the Constitution. More recently, this Court has recognized the authority of the Senate to confer

procedural powers on the Lieutenant Governor, and it refused in *Tuck v. Blackmon* to interfere with the Lieutenant Governor's ruling that conference reports need not be read in full under Miss. Const. art. 4, § 59 (1890). These cases are properly understood as holding that the judiciary lacks jurisdiction to rule on internal procedural matters.

The enforcement of the doctrine of separation of powers has sometimes required this Court to resolve conflicts between the separate branches of government. In the first decade after the adoption of the Constitution, this Court ruled that a purported partial veto by the Governor had failed to comply with Miss. Const. art. 4, § 73 (1890). The Court issued a similar ruling in 1995. This Court has also held, applying Miss. Const. art. 1, § 2 (1890), that legislators cannot serve on boards and commissions in the Executive Branch. This Court recently prevented the Legislature from diverting levee taxes from the levee purposes to which they are devoted by Miss. Const. art. 11, § 236. Just as this Court has consistently held that the judicial power includes the power to prescribe rules of internal procedure, so too does the legislative power vest the Legislature with sole authority to prescribe and enforce internal procedural rules.

The overwhelming majority of other States agree that the judiciary cannot interfere with internal legislative procedures. Several Supreme Courts make clear that the prohibition is jurisdictional. Others are not clear on whether the refusal to interfere stems from a lack of jurisdiction or a discretionary decision not to exercise that jurisdiction. A few courts expressly hold that jurisdiction exists, but they conclude that its exercise would not be appropriate or suitable. Whatever the reasoning, other States agree with this Court that the courts should not intervene in internal legislative affairs.

Alternatively, even if jurisdiction exists, this Court should follow its consistent practice of deferring to reasonable interpretations and applications of internal rules of procedure by legislative officers. "[O]ur question is whether the ruling of the Lieutenant Governor was a grossly

unreasonable interpretation of Section 59, and, if so, whether the legislative process suffered substantial harm from that ruling." *Tuck*, 798 So. 2d at 407-08. This Court has afforded identical deference to rulings of the Governor in the exercise of powers conferred upon him by statute. In so doing, this Court presumes that the Legislature and its officers have attempted to act consistently with the Constitution. Here, it is undisputed that Speaker Gunn has acted consistently with the literal words of § 59 of the Constitution. Although Representative Hughes complains that bills are being read too fast, he admits that all words of all bills have been read. Historical records indicate that the purpose of § 59 was to assure that legislators had knowledge of the bills upon which they were about to vote, and the affidavit of the Clerk of the House establishes without contradiction that every Representative has immediate access to the language of every bill in electronic and printed form.

Further in the alternative, should this Court decide to address the merits of the Circuit Court's decision to issue a temporary restraining order, that order was flawed both procedurally and substantively. Before a TRO may be issued without notice, as was done here, Rule 65(b) requires the applicant to swear to facts which would constitute immediate and irreparable injury and to certify the efforts made to give notice to the adverse party; Representative Hughes neglected both of these requirements. Rule 65(b) also requires that the TRO itself define the irreparable injury and state why the order was issued without notice; the Circuit Court met neither of these requirements. Moreover, Representative Hughes has neither alleged nor proven facts sufficient to justify the issuance of injunctive relief without trial. Neither he nor any Member has suffered any injury, because the Clerk's affidavit shows that the content of all bills is immediately available at all times. Moreover, there is no likelihood that Representative Hughes will prevail on the merits, because he has failed to state a proper claim for relief. As already noted, Speaker Gunn has complied with the literal language of § 59. At the very least, this Court under *Tuck* should defer

to his interpretation of § 59. Because no claim for relief has been stated, this Court should order the dismissal of Representative Hughes's petition.

ARGUMENT

Standard of Review[2]

Although appeals from temporary restraining orders are typically reviewed under an abuse of discretion standard, *see, e.g., American Legion Post # 134 v. Mississippi Gaming Comm'n*, 798 So. 2d 445, 454 (Miss. 2001), citing *Moore v. Sanders*, 558 So. 2d 1383, 1385 (Miss. 1990), this case is far from typical.

In *Greater Fairview Missionary Baptist Church v. Hollins*, 160 So. 3d 223 (Miss. 2015), in which this Court addressed whether the Chancery Court erred in entering a TRO, the Court noted that "a 'de novo standard of review is applied to questions of law, legal conclusions, and jurisdictional questions.'" *Id.*, at 228, quoting *Aladdin Constr. Co. v. John Hancock Life Ins. Co.*, 914 So. 2d 169, 174 (Miss. 2005). At issue in that case was whether the Chancery Court had subject matter jurisdiction over "a purely ecclesiastical controversy." *Greater Fairview*, 160 So. 3d at 228, 233.

Here, Speaker Gunn submits that the Circuit Court did not have subject matter jurisdiction to rule on Representative Hughes's petition, and that the petition failed to state a claim upon which relief could be granted. No factual disputes are presented, and there are no factual findings to be reviewed. Much like appeals from orders deciding dismissal motions under M.R.C.P. 12(b)(1) and 12(b)(6), this appeal presents purely legal questions, and this Court should thus consider those questions under a *de novo* standard of review. *See, e.g., Guidant Mut. Ins. Co. v. Indemnity Ins. Co.*, 13 So. 3d 1270, 1275 (Miss. 2009) ("parties assert that there are no disputed issues of material

[2] Nothing in M.R.A.P. 28 expressly requires the parties to address the standard of review. Because Speaker Gunn believes such a discussion will assist the Court, he includes it before his discussion of the issues, as provided for federal appeals by Fed. R. App. P. 28(a)(8)(B).

fact"; "[a]ppellate review of purely legal questions also requires a de novo standard of review"); *Ralph Walker, Inc. v. Gallagher*, 926 So. 2d 890, 893 (Miss. 2006) ("motion for dismissal under Miss. R. Civ. P. 12(b)(6) raises an issue of law, and we unquestionably review questions of law under a de novo standard of review"); *Jones v. Billy*, 798 So. 2d 1238, 1239 (Miss. 2001) (court reviews issue of whether Circuit Court lacked subject matter jurisdiction under *de novo* standard).

I. NO JURISDICTION EXISTS TO ADJUDICATE THE PROPRIETY OF PROCEEDINGS INTERNAL TO THE HOUSE OF REPRESENTATIVES.

In its *en banc* order granting Speaker Gunn's petition for interlocutory appeal, this Court instructed the parties to address two legal issues. The first is "whether the judiciary has jurisdiction over this dispute in light of Sections 1 and 2, Article 1 of the Mississippi Constitution." R. 37, R.E. 29. Although courts regularly examine whether a particular court has jurisdiction over a particular dispute, the order requires by its terms an examination of the jurisdiction of the entire judiciary of this State.

This Court has previously defined the crucial term:

> "'Jurisdiction' is a broad term, and has been defined in countless ways by courts. Generally speaking, it means the power or authority of a court to hear and decide a case." *Penrod Drilling Co. v. Bounds*, 433 So. 2d 916, 922 (Miss. 1983).

Fitch v. Valentine, 946 So. 2d 780, 783 (Miss. 2007). For the reasons explained hereafter, no Mississippi court has "the power or authority . . . to hear and decide a case," *id.*, challenging the propriety of proceedings conducted inside the House of Representatives.

A. Under the doctrine of separation of powers, a dispute concerning proceedings in the House of Representatives must be resolved by the House, not by the courts.

The *en banc* order properly begins with the principle that an understanding of the jurisdiction of the judiciary must begin with the basic concept of separation of powers. That doctrine is firmly set forth in the very first substantive provision of our Constitution:

> The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Miss. Const. art. 1, § 1 (1890).[3] Section 1, however, does not specify "those which are judicial." Other provisions of the Constitution throw some light on that subject.

Article 6 of the Constitution concerns the judiciary, and begins, "The judicial power of the State shall be vested in a Supreme Court and such other courts as are provided for in this Constitution." Miss. Const. art. 6, § 144 (1890). It requires no leap of logic to understand that "judicial power" includes "the power . . . to hear and decide a case," *Fitch*, 946 So. 2d at 783, which this Court has recognized as the definition of jurisdiction.[4]

Section 144 goes on to divide the "judicial power" among the "Supreme Court and such other courts as provided for in this Constitution." This Court is granted "such jurisdiction as properly belongs to a court of appeals." Miss. Const. art. 6, § 146 (1890). Applying substantially identical language found in Miss. Const. art. 4, § 4 (1832), the Court held that the scope of appellate jurisdiction "is one depending on general considerations of public policy, which, for the most part, must be determined by the legislature," which may by statute "limit the cases and the extent to

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[3] The next section demonstrates the importance of adherence to the principles set forth in § 1:

> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in any of the other departments.

Miss. Const. art. 1, § 2 (1890).

[4] In addition to the exercise of jurisdiction, "[t]he phrase 'judicial power' in section 144 of the Constitution includes the power to make rules of practice and procedure" as to "judicial business." *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975), quoting *Southern Pac. Lbr. Co. v. Reynolds*, 206 So. 2d 334, 335 (Miss. 1968).

which certain remedies may be pursued." *Dismukes v. Stokes*, 41 Miss. 430, 433 (1867).[5] The jurisdiction of the Circuit Court, where Representative Hughes instituted this proceeding, has "original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court." Miss. Const. art. 6, § 156 (1890). It should be noted that part of the jurisdiction that "properly belongs to a court of appeals" is to correct the lower courts when they purport to exercise jurisdiction they lack. That is what this Court did last year when it exercised its appellate jurisdiction by reversing this same Circuit Court for acting without jurisdiction. *Legislature v. Shipman*, 170 So. 3d 1211, 1219 (Miss. 2015).

While the Constitution itself says little more about the "judicial power,"[6] it says much more about the "legislative power," which is "vested in a Legislature which shall consist of a Senate and a House of Representatives." Miss. Const. art. 4, § 33 (1890). Section 1 tells us that the "powers of the government" are "divided," so any power which is conferred upon the Legislature is necessarily withheld from the judiciary. For instance, the power to "judge of the qualifications, return and election of its own members" is conferred upon "[e]ach house." Miss. Const. art. 4, §

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[5] This Court has sometimes disagreed as to whether a statute constitutes a permissible regulation of jurisdiction or an impermissible imposition of procedural rules. *Compare Jones v. City of Ridgeland*, 48 So. 3d 530, 537 (Miss. 2010), *with id.*, at 543-44 (Waller, C.J., concurring). That disagreement plays no role in the resolution of this case, which involves procedures employed in the House of Representatives, not in the courts.

[6] History, however, sheds further light on the extent of the judicial power. For instance, this Court has repeatedly refused to entertain "an ecclesiastical controversy . . . over which the civil courts have no jurisdiction, unless some property rights of the complainant are involved." *Conic v. Cobbins*, 208 Miss. 203, 44 So. 2d 52, 55 (1950). More recently, this Court reaffirmed that "civil courts may not take jurisdiction over a religious organization's internal, ecclesiastical matters." *Roman Catholic Diocese of Jackson v. Morrison*, 905 So. 2d 1213, 1236 (Miss. 2005). This Court recognized that this restriction on the "judicial power" goes back at least to *Watson v. Jones*, 80 U.S. 679 (1872), which did not rely on constitutional provisions protecting religion to restrict a jurisdiction that would have otherwise existed. 905 So. 2d at 1235 & n.16. History, then, recognizes that there are categories of genuine disputes which, by their very nature, fall outside the "judicial power." "Mississippi courts 'are not authorized to resolve every claim and dispute that may arise between our citizens.'" *Greater Fairview*, 160 So. 3d at 229, quoting *In re Bell*, 962 So. 2d 537, 541 (Miss. 2007).

38 (1890). For that reason, this Court reversed a Circuit Court which purported to resolve a contest for election to the Senate.

> Section 38 vests competence of Harden's qualifications for office – including whether she meets the residency qualifications – in the Senate. Accordingly, there is no authority in the judiciary to hear this case. The court below correctly dismissed for lack of subject matter jurisdiction.

Foster v. Harden, 536 So. 2d 905, 907 (Miss. 1988). The principle announced in *Foster* is clear and unescapable: A power conferred by the Constitution on the Legislature lies outside the jurisdiction of the judiciary.[7]

The text of the Constitution itself explicitly labels §§ 54-77 of article 4 as "Rules of Procedure." In *Hunt v. Wright*, its first case construing the legislative provisions of the new Constitution of 1890, this Court found it relevant that this subdivision of article 4 had been so characterized. 11 So. at 609. This Court found that characterization important in refusing to investigate whether a statute, properly signed by the Speaker, the Lieutenant Governor, and the Governor, had been adopted in violation of § 68:

> The constitution, as to mere rules of procedure prescribed for the legislature, is committed to the members individually and collectively, and the houses are intended as a mutual check, and the governor on both, and courts will not inquire into the antecedents of legislative enactments, and have no claim to be present at the parturition. This duty begins when legislative travail is over.

Id., at 610. The opinion makes clear that the refusal to "inquire" into internal procedures derives, not from discretion, but from lack of power. "[T]he legislature, as a co-ordinate department of the state government, invested by the constitution with legislative power, is not subject to supervision and revision by the courts as to those rules of procedure prescribed by the constitution for its

[7] The same is true of powers conferred by statute on the Legislature, at least in the political sphere. In *Mauldin v. Branch*, 866 So. 2d 429, 434 (Miss. 2003), this Court ruled "that *no* Mississippi court has jurisdiction to draw plans for congressional redistricting" (emphasis in original). This Court disclaimed any such power even though it was undisputed that "our Legislature defaulted on its constitutional and statutory obligations to the citizens of the state." *Id.*, at 436. No such default is even arguably present in this case.

observance." *Id.*, at 609. Rules enforcement, then, is part of the "legislative power," not the "judicial power."

This rule of legislative authority over internal procedures was established under the Constitution of 1869 by *Ex parte Wren*, 63 Miss. 512 (1886). The Court in *Hunt* ruled "that the constitutional convention of 1890 adopted those views, for all of the provisions of the constitution of 1869, with reference to which that case was decided, were readopted as part of the constitution of 1890, without any indication of purpose to introduce a new rule on this important subject." 11 So. at 609. The Court that decided *Hunt*, only two years after the adoption of the Constitution, was presumably familiar with the limitation the Framers placed on the "judicial power." In an earlier case concerning the separation of powers, this Court recognized the importance of the contemporary understanding of the Constitution. "[T]he intention of the draftsmen was undoubtedly more firmly implanted in the memory of legislators at that time than at present." *Alexander v. State ex rel. Allain*, 441 So. 2d 1329, 1340 (Miss. 1983). *See also Land Commissioner v. Hutton*, 307 So. 2d 415, 421 (Miss. 1974) ("[T]he Court in 1925 was in a much better position to ascertain the intent of the legislature in passing the Act than we are at this late date."); *Welch v. Texas Dept. of Highway & Pub. Transp.*, 483 U.S. 468, 495 n.28 (1987) (finding it "not immaterial that we are a century further removed from the events at issue").

The principles expounded in *Wren*, then, carry forward to cases decided under our current Constitution. In *Wren*, a traveling salesman claimed that the legislative journals established that the provision of the statute under which he had been arrested had not been adopted by both Houses of the Legislature. 63 Miss. at 512-13. Rejecting that contention, this Court explained:

> The fundamental error of any view which permits an appeal to the journals to see if the constitution has been observed in the passage by both houses of their enactments, is the assumed right of the judicial department to revise and supervise the legislative as to the manner of its performance of its appointed constitutional functions. It is the admitted province of the courts to judge and declare if an act of

> the legislature violates the constitution, but this duty of the courts begins with the completed act of the legislature. It does not antedate it.

Id., at 533. This Court found constitutional provisions governing legislative procedure to be mandatory, but not to be enforceable in the courts:

> The sound view . . . is to regard all of the provisions of the constitution as mandatory, and those regulating the legislative department as addressed to and mandatory to that body, and with which the courts have nothing to do in the way of revision of how the legislature has performed its duty in the matters confided exclusively to it by the constitution.

Id., at 534. Thus, the courts have full authority to "judge of the conformity of the legislative acts to the constitution, but what are legislative acts must be determined by what are authenticated as such according to the constitution." *Id.*

The principles announced in *Hunt* and *Wren* remain binding over a century after their announcement. This Court quoted extensively from those two opinions in resolving the issue presented in *Tuck v. Blackmon*, 798 So. 2d at 406-07. In that case, involving the same § 59 at issue here, Senator Barbara Blackmon had raised a point of order to require the reading of a conference report. Lieutenant Governor Amy Tuck ruled to the contrary "because the matter before the Senate was not a bill, but was a conference report, not subject to the requirements of Section 59." *Id.*, at 405. Senator Blackmon did not appeal the decision of the chair, as permitted by the Senate Rules, but joined six other senators in asking the Chancery Court for the First Judicial District of Hinds County to grant "injunctive relief to compel the enforcement of Section 59 as they understood it." *Id.*

In reversing the injunction granted by the Chancery Court, this Court reasoned that "*Hunt*, as well as *Wren*, recognizes the procedural provisions for the operation of the Legislature – whether created by constitution, statute or rule adopted by the houses – should be left to the Legislature to apply and interpret, without judicial review." *Id.*, at 407. Nothing said in *Tuck* purports to overrule

the holding that judicial review is not available to supervise the internal procedures of the Legislature.[8] The Court thus denied relief to the Senators. *Id.*, at 408-09.

In so doing, this Court rejected an effort to declare that *Hunt* and *Wren* had been overruled by *Dye v. State ex rel. Hale*, 507 So. 2d 332 (Miss. 1987). Even though this Court in *Dye* refused to invalidate Senate rules, the concurrence of Justice Diaz in *Tuck* relied on dictum from *Dye* as "implicitly overrul[ing] the language relied upon by the majority cited from the earlier" *Wren* and *Hunt* opinions. *Tuck*, 798 So. 2d at 412 (Diaz, J., concurring).[9] Justice Banks agreed that *Dye* had claimed jurisdiction over procedural disputes arising within the Senate. *Id.*, at 413-14 (Banks, J., dissenting). Although the majority acknowledged the broader language of *Dye*, *id.*, at 405-06, it nevertheless adhered to *Hunt* and *Wren*, which it characterized as permitting the Senate to regulate its operations "without judicial review." *Id.*, at 407.[10]

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[8] The opinion did proceed to entertain the possibility that jurisdiction might exist to review a particularly egregious violation of procedural rules. Acknowledging that rules first "must be interpreted and applied" by the legislative body, the Court continued:

> Only where that body (or in this case, the President of the Senate who is, by its rules, vested with authority to make rulings on points of order) exercises the responsibility in a manifestly wrong manner which does critical harm to the legislative process is judicial intervention justified.

Id. The Court having previously announced the unavailability of judicial review, the further discussion should be regarded as dictum. *Simpson v. Poindexter*, 241 Miss. 854, 134 So. 2d 445, 446 (1961) (reference "unnecessary to the decision of the case . . . should be treated as dictum"). *Accord*, *Smith v. Normand Children Diversified Class Trust*, 122 So. 3d 1234, 1237 (Miss. App. 2013) ("Dicta are statements 'not necessary to the court's ruling.'"), quoting *McKibben v. City of Jackson*, 193 So. 2d 741, 745 (Miss. 1967).

[9] Justice Diaz was forced to suggest that *Hunt* and *Wren* had been "implicitly overrule[d]" because none of the three separate opinions in *Dye* even mentions either of those cases. That is hardly surprising, as the briefs in *Dye*, stored in the Mississippi Archives, reveal that neither the parties nor the amici even mentioned *Hunt* or *Wren*. This Court is not in the habit of overruling precedents without saying so, especially where no party has so requested. "[W]hen a majority of the Court speaks, it speaks as the voice of the State, and is binding in effect until and unless overruled." *Childress v. State*, 188 Miss. 573, 195 So. 583, 584 (1940).

[10] More recently, this Court again relied on the holdings of *Wren* that "review of a facially valid legislative act is nonjusticiable." *In re Hooker*, 87 So. 3d 401, 409 (Miss. 2012). The dissent concluded that *Wren* had no application to the review of executive acts, but did not suggest that its holding had been overruled. *Id.*, at 435 (Randolph, J., dissenting).

Whatever may be said about the language of *Dye*, or even *Tuck*, the fact remains that this Court has consistently refused to interfere in the internal procedures of the House or the Senate. In *Wren*, *Hunt*, *Dye*, and *Tuck*, as well as *Foster v. Harden*, this Court has consistently declined to impose its will on the internal affairs of the Legislature. That unbroken history plainly teaches that this Court regards such interference as lying outside of its jurisdiction.

B. The judiciary resolves conflicts between branches of government, but does not interfere in the internal affairs of the other branches.

This Court's refusal to involve itself in the internal affairs of other branches of government contrasts with its regular practice of resolving disputes between the branches. The resolution of most disputes, of course, is at the heart of the "judicial power," but this Court exercises that power sparingly where the prerogatives of the other branches are involved. In one of its earliest applications under the Constitution of 1890, this Court described the declaration of "the boundaries beyond which executive action may not pass" as "[t]he most difficult and delicate duty that ever falls to the lot of a court of last resort." *State ex rel. Teachers & Officers of Indus. Inst. & College v. Holder*, 76 Miss. 158, 23 So. 643 (1898).

That duty arose because the Auditor refused to pay the faculty and staff of the College, the Governor having purported to issue a partial veto of its appropriation. The Governor had no objection to the amount of the appropriation, but he vetoed conditions that the Legislature placed upon its expenditure, claiming to find that authority in Miss. Const. art. 4, § 73 (1890). 23 So. at 644. The faculty and staff thereupon sued for their salaries.

This Court acknowledged that § 73 authorizes a partial veto of an appropriation bill, but concluded that it did not permit the Governor to edit the bill at will. The approval of the sum of an appropriation while disapproving the conditions attached to its expenditure "would be the enactment of law by executive authority without the concurrence of the legislative will, and in the

face of it." *Id.*, at 645. This Court acted to protect the Legislature from such abuse by the Governor. "Both legislative declaration and executive approval are essential prerequisites to the enactment of any law." *Id.*[11]

This Court returned to the question of the partial veto in *Fordice v. Bryan*, 651 So. 2d 998 (Miss. 1995). Governor Fordice, purporting to act under § 73, issued partial vetoes of several money bills adopted by the Legislature. This Court found two of the statutes to constitute bond bills, not appropriation bills, and held that § 73 had no application at all. *Id.*, at 1001. The Court also invalidated supposed partial vetoes of 27 appropriation bills as violating the principles announced in *Holder*. *Id.*, at 1002. After rejecting the claim that the Governor was immune from suit, *id.*, at 1003, the Court explained the necessity of its action:

> This Court, as the third branch, recognizes that the other two branches, both strong and independently minded, were and are motivated by the best of intentions and good faith as each performs necessary acts of governance.
>
> For those necessary acts of governance to continue, disputes involving separation of powers must be resolved as they arise, and the resolution of this particular dispute is consistent with sound jurisprudence and the established law of this State.

Id., at 1003-04.

This Court has taken equal care to protect the Executive Branch from intrusions by the Legislature in such cases as *Alexander v. State ex. rel. Allain.* Over a period of many years, the Legislature had created as part of the Executive Branch multiple boards and commissions on which Members of the Legislature served. In finding executive service by legislators to be unconstitutional, this Court relied explicitly upon § 2 of the Constitution, 441 So. 2d at 1339, which declares, "The acceptance of an office in either of said departments shall, of itself, and at

[11] Because the attempted partial veto "was a nullity," *id.*, the Legislature's adjournment had left the bill "yet in the hands of the governor," with the result that no part of it had become law. *Id.*, at 646. Plaintiffs therefore had to wait for their money until the Legislature reconvened, thereby allowing the Governor to determine whether he wished to assert a complete veto.

once, vacate any and all offices held by the person so accepting in either of the other departments." This Court had no choice but to declare simultaneous service in multiple branches unconstitutional, although it temporarily delayed the effect of its ruling, "in order that the legislative and executive departments may have a reasonable period of time within which to make adjustments in the operation of government." *Id.*, at 1347.

More recently, this Court has protected a unit of the Executive Branch from financial interference by the Legislature, in *State v. Board of Levee Commissioners for the Yazoo-Mississippi Delta*, 932 So. 2d 12 (Miss. 2006). Article 11 of the Constitution of 1890 provides for the maintenance of levees, and boards for each district were created by Miss. Const. art. 11, § 229 (1890). Section 236 authorizes the imposition of taxes "for levee purposes," but the Legislature in 2004 adopted a statute requiring the Board to transfer $5,000,000 into the Budget Contingency Fund. 932 So. 2d at 14. This Court invalidated the statute, declaring that "Section 236 does not permit the Legislature to take Board funds which are constitutionally mandated for levee purposes, and redirect them toward non-levee purposes." *Id.*, at 26.

Finally, as already noted, this Court has acted to protect the judiciary from encroachment by the Legislature. This Court held in *Newell* that the "judicial power" includes the power to prescribe rules of procedure, rendering ineffective any statutory efforts to impose rules. Although, as *Jones v. City of Ridgeland* illustrates, Justices of this Court may sometimes disagree as to which statutes attempt to impose procedural rules, there is no dispute that the Legislature has no power over the internal procedures of the court system. For exactly the same reason, the judiciary has no power over the internal procedures of the House. Just as this Court protects its own power to prescribe internal procedures, so too the principles announced in *Wren* and *Hunt* require this Court to recognize the authority of the House over its own internal procedures.

C. The courts of other States refuse to interfere with internal legislative procedures.

Case law is practically unanimous throughout the United States that courts will not interfere with the internal procedures of legislative bodies. It is not always clear, however, whether that refusal is jurisdictional or prudential. Nevertheless, the courts of several States make clear that no power exists to oversee internal legislative affairs.

The clearest recent example is found in *Gray v. Gienapp*, 727 N.W.2d 808 (S.D. 2007). There, a trial court ordered the officers and Members of the South Dakota Senate not to proceed with disciplinary hearings concerning the conduct of a Senator. *Id.*, at 810. The Senate asked the Supreme Court for a writ of prohibition, which is available against a judicial tribunal "when such proceedings are without or in excess of the jurisdiction of such tribunal." *Id.*, at 812, quoting S.D.C.L. 21-30-1. After reviewing the constitutional doctrine of separation of powers, the Supreme Court squarely held, "The circuit court had no jurisdiction to halt a legislative disciplinary process." *Id.*, at 815.

One of the cases upon which the South Dakota Court relied, *id.*, at 814, was *Florida Senate v. Florida Pub. Emp. Council 79*, 784 So. 2d 404 (Fla. 2001). There, a trial court enjoined the Legislature from conducting a hearing on a collective bargaining dispute. *Id.*, at 406. Granting a writ of prohibition, the Supreme Court held that "Florida courts have full authority to review the final product of the legislative process, but they are *without authority* to review the internal workings of that body." *Id.*, at 409 (emphasis added). The Court continued: "[T]he circuit court did what it had *no authority* to do: It issued an order contravening the internal workings of the Legislature." *Id.* (emphasis added). That lack of authority equates to lack of jurisdiction is plain from the separate opinion in the case, "agree[ing] with the majority that the temporary restraining

order . . . exceeds the scope of the circuit court's jurisdiction." *Id.*, at 410 (Quince, J. concurring and dissenting).

The Supreme Court of Nevada similarly indicated the lack of power to interfere in the legislative affairs in *Heller v. Legislature*, 120 Nev. 456, 93 P.3d 746 (2004). There, the Secretary of State sued the Legislature to determine whether state and local government employees could serve as legislators consistent with the doctrine of separation of powers. 93 P.3d at 748. The Supreme Court of Nevada addressed procedural bars to the Secretary's action before directly addressing constitutional issues, entitling the latter analysis, "The Nevada Constitution bars judicial review of a state executive branch employee's service in the Legislature." *Id.*, at 752. The Court rejected the Secretary's request "to direct the ouster or exclusion of state executive branch employees from legislative service. This we cannot do." *Id.*, at 753. Nothing in the opinion suggests that the Court regarded its restraint as a matter of discretion.

Finally, the Supreme Court of Vermont recognized exclusive legislative jurisdiction over internal matters in *Brady v. Dean*, 173 Vt. 542, 790 A.2d 428 (2001). Private citizens sued to invalidate a statute on the basis that fourteen legislators had been allowed to vote in violation of an internal House Rule. 790 A.2d at 430. Examining constitutional provisions vesting the House with the authority to judge the qualifications of its members, the Court concluded that "the legislature has the *sole authority* to do so, and courts *must refrain* from interfering in that determination." *Id.*, at 431 (emphasis added). Whether the Speaker had properly enforced the rules was "constitutionally entrusted to the sound and exclusive judgment of the House, not to this Court." *Id.*, at 432.

The courts of many other states have declined to interfere with internal legislative affairs without making clear whether their decisions were based on lack of power or a prudential decision not to exercise that power. *See, e.g., Hoag v. State*, 889 So. 2d 1019 (La. 2004) (refusing to order

Legislature to pass an appropriations bill); *Smigiel v. Franchot*, 410 Md. 302, 978 A.2d 687 (2009) (refusing to rule whether Senate had properly obtained House consent to adjournment of more than three days); *Urban Justice Ctr. v. Pataki*, 38 A.D.3d 20, 828 N.Y.S.2d 12 (2006) (refusing to determine whether majority had properly funded minority staff); *State ex rel. Holmes v. Clawges*, 702 S.E.2d 611 (W.Va. 2010) (refusing to order changes to legislative journals). Whatever the reason, judicial refusal to interfere with internal legislative affairs is almost universal.

The Supreme Court of Indiana, however, distinguished between power and discretion in *Berry v. Crawford*, 990 N.E.2d 410 (Ind. 2013). There, members of the House boycotted its proceedings in order to deny the House a quorum. The House imposed fines on the absent legislators as a disciplinary matter, but a trial court ordered return of the money and enjoined withholding fines from salaries. *Id.*, at 413-14. The Supreme Court acknowledged that the Indiana Constitution conferred disciplinary authority upon each house. *Id.*, at 415. In the process of reversing the trial court order, the Supreme Court explained the difference between jurisdiction and justiciability:

> The distinction between jurisdiction and justiciability is a fine one and has been confused in the past. It is necessary here to clearly explain this distinction. Jurisdiction is defined as "[a] court's power to decide a case or issue a decree." Black's Law Dictionary, 927 (9th ed. 2009). It is the power in the first instance for a court to exercise authority over and rule on a dispute. Justiciability, on the other hand, is "[t]he quality or state of being appropriate or suitable for adjudication by a court." *Id.* at 943. Accordingly, prudential concerns over the appropriateness of the case for adjudication may preclude the courts from deciding a dispute on the merits.

990 N.E.2d at 417-18. After reviewing the relevant constitutional provisions, the Court concluded, "The issues are non-justiciable, and, as a constitutional and prudential matter, it is improper for the judicial branch to entertain consideration of the plaintiffs' requests for relief." *Id.*, at 421.[12]

[12] Any potential ambiguity in the *Berry* holding has been dispelled by *Citizens Action Coalition v. Koch*, ____ N.E.3d ____, 2016 WL 1572610 (Ind. Apr. 19, 2016). In a case involving access to a

The weight of authority in other States, then, seems to regard the doctrine of separation of powers as placing a restraint on the power and jurisdiction of the courts to review internal legislative affairs. Those courts that believe such jurisdiction exists, as in Indiana, conclude that it should almost never be exercised. Should this Court determine that such jurisdiction exists, then, for the reasons set out in Part II hereafter, it should conclude that the issue presented here is not justiciable, and it should therefore decline relief.

II. IN THE ALTERNATIVE, THIS COURT SHOULD DEFER TO THE SPEAKER'S REASONABLE INTERPRETATION OF § 59.

The second question posed by this Court's *en banc* order of May 9, 2016, is reached only in the event of an affirmative answer to the first question. Obviously, if this Court concludes that the judiciary has no jurisdiction over the internal affairs of the House of Representatives, then it must order the dismissal of Representative Hughes's petition. In the event that jurisdiction exists, the Court has directed the parties to address "whether this Court should refrain from exercising its jurisdiction over the issues raised in this matter." R. 37, R.E. 29. Both *Dye* and *Tuck* indicate, and other cases involving the Executive Branch hold, that this Court will not intervene in the affairs of a separate branch of government where the officers of the other branch are acting upon a reasonable construction of the applicable law.

There can be no question that the language employed in *Dye* goes farther than any other decision of this Court in suggesting the possibility of judicial intervention into the internal affairs of the Legislature, but, even there, this Court declined to act. Two Senators obtained a declaratory judgment from the Circuit Court for the First Judicial District of Hinds County, holding that Senate Rules had unconstitutionally vested legislative power in the Lieutenant Governor, an officer of the Executive Branch. This Court reversed. 507 So. 2d at 334-35.

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legislator's records, the Supreme Court quoted *Berry* and confirmed the existence of subject matter jurisdiction. *Id.*, at *2. It nevertheless found the dispute to be non-justiciable. *Id.*, at *5.

After an extensive discussion of the history and the powers of the office of Lieutenant Governor, both in Mississippi and throughout the United States, this Court announced its standard of review:

> While the Court certainly has the authority to declare Senate rules unconstitutional, the Court should not do so unless those rules are "manifestly" beyond the Senate's constitutional authority. Indeed, this Court has zealously defended its authority to make rules regulating procedures within the Judicial Department free of any restrictions found in statutes. *Newell* . . . . Considerations of comity militate in favor of this Court's restraint in the face of a challenge to the Senate's similar prerogative to adopt its own rules, absent manifest unconstitutionality of a type not present here.

Id., at 345-46 (footnote omitted).

In *Tuck*, this Court quoted *Dye*'s statement of the standard of review, 798 So. 2d at 406, and proceeded to apply it, not just to the Senate Rules themselves, but to Lieutenant Governor Tuck's interpretations of rules of procedure:

> It is not necessary for the Court today to determine whether conference reports should be read at the request of a senator. Rather, our question is whether the ruling of the Lieutenant Governor was a grossly unreasonable interpretation of Section 59, and, if so, whether the legislative process suffered substantial harm from that ruling.

Id., at 407-08.[13] Lieutenant Governor Tuck ruled that conference reports did not constitute bills subject to final reading under § 59 of the Constitution, and this Court, after having noted how bills and conference reports are treated in different sections of the Constitution, *id.*, at 408, found it "impossible for us to say that her ruling was arbitrary or manifestly wrong." *Id.*, at 409.

This Court has afforded identical deference to rulings of the Executive Branch concerning its own powers. In *Barbour v. State ex rel. Hood*, 974 So. 2d 232 (Miss. 2008), Attorney General

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[13] The deference to the Lieutenant Governor stemmed from this Court's recognition that rules of internal procedure, "whether internally generated or found in the Constitution, are addressed to the Senate where they must be interpreted and applied." *Id.*, at 407. Just as the Lieutenant Governor "is, by its rules, vested with authority to make rulings on points of order," *id.*, so too has the House vested the Speaker with similar authority under its Rule 4. This, then, is the source of the Speaker's authority questioned by Justice King in the first two questions presented in his separate statement accompanying this Court's order of May 9, 2016. R. 39, R.E. 31.

Hood challenged the legality of Governor Barbour's exercise of his statutory authority under Miss. Code Ann. § 23-15-855 (Rev. 2007) to set a date for a special election for United States Senator. After acknowledging the importance of §§ 1-2 of the Constitution providing for separation of powers, this Court followed federal precedents on the level of deference due to the Executive Branch:

> *Chevron [U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] adds that "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is *entrusted to administer* . . . ." *Id.*, at 844 . . . (emphasis added).

974 So. 2d at 240. This Court found it worth emphasizing that it had granted similar "deference to the Legislature" in *Tuck* and *Dye*. *Id.*, at 241 n.11.

On this record, little deference is needed to conclude that Speaker Gunn has conducted the internal affairs of the House consistent with § 59 of the Constitution. Unlike the case in *Tuck*, Representative Hughes did not raise a point of order on the floor of the House, so Speaker Gunn never had the opportunity to make a ruling, and the House certainly never had the opportunity to consider the merits of such a ruling.[14] Still, this Court has always assumed that legislative officers, like all State officers, do their best to do their duties consistent with the Constitution. "[W]e think the best way to preserve and perpetuate the respective rights of the three separate and co-ordinate departments of government under which we live is for each to treat the action of the other within its limitations with due respect and without distrust." *State ex rel. Collins v. Jones*, 106 Miss. 522, 64 So. 469, overruling sugg. of error in 64 So. 241 (1914). As this Court long ago explained:

> The Legislature must be deemed to have acted with integrity, and with a just desire to keep within constitutional limitations. The Legislature is a co-ordinate branch of the government with the judiciary, invested with high and responsible duties,

[14] House Rule 4 provides that the Speaker "shall . . . decide all questions of order, subject to appeal by any member." The failure of Representative Hughes to take advantage of Rule 4 should not deprive Speaker Gunn of the deference afforded to the Lieutenant Governor in *Tuck*.

> and legislates under the solemnity of an oath, which they are not supposed to disregard.

Natchez & S.R.R. Co. v. Crawford, 99 Miss. 714, 55 So. 596, 598 (1911).

The uncontested facts, to which Representative Hughes has sworn, demonstrate that Speaker Gunn has complied with the literal language of § 59. In paragraph 6 of his petition, Representative Hughes says that Speaker Gunn has had "the words of the bills read by an electronic device (set on the highest speed adjustment, #10) such that the same is being read artificially and so quickly that no human ear nor mind can comprehend the words of the bills." R. 5, R.E. 5. Section 59 simply says that "every bill shall be read in full immediately before the vote on its final passage upon the demand of any member." It is undisputed that Speaker Gunn has been doing precisely that.

Representative Hughes apparently believes that § 59 somehow commands more than its words actually say. In analogous cases reviewing the actions of the Executive Branch, this Court has deferred to the responsible officer's interpretation where the text itself is silent. "[I]f the statute is *silent or ambiguous with respect to the specific issue*, the question for the court is whether the agency's answer is based on a *permissible construction of the statute*." *Barbour*, 974 So. 2d at 240, quoting *Chevron*, 467 U.S. at 843 (emphasis added by *Barbour* Court). Here, § 59 is silent concerning the speed at which the bills may be read. The question before this Court, then, is whether Speaker Gunn is operating under a permissible construction of § 59.

Nothing in the limited history of § 59 lends support to Representative Hughes's allegation that Speaker Gunn has violated the "spirit of the Mississippi Constitution." R. 5, R.E. 5. Section 59 was originally proposed to the 1890 Constitutional Convention as § 30 of the report of the Legislative Committee on September 19, 1890. Journal of the Proceedings of the Constitutional Convention of Mississippi 209 (1890). The Convention approved that part of the report without amendment ten days later. *Id.*, at 326-27. It was ultimately adopted by the Convention as § 59 of

the final document. *Id.*, at 637-38. Neither the Journal nor newspaper reports contained any record of any debate or discussion.

However, the members of the Convention were well aware of the history embodied in the requirement that bills be read aloud. The Journal reflects that the Convention relied upon one of the nineteenth century's leading scholarly authorities on legislative procedures. *Id.*, at 48, citing L. Cushing, Legislative Assemblies (2d ed. 1863). Cushing described the requirement of three readings of each bill as "the invention of an early period of parliamentary history, when the accomplishments of reading and writing were not so general as they now are, and when the art of printing was either unknown, or very little practised." *Id.*, at 830. Indeed, the text of the Constitution itself reflects the Convention's concern that some legislators would lack the ability to read. To this day, each new Member must swear "that I will, as soon as practicable hereafter, carefully read (*or have read to me*) the Constitution of this State." Miss. Const. art. 4, § 40 (1890) (emphasis added). There can be little doubt, then, that the Framers of the 1890 Constitution intended § 59 as a benefit for legislators who could not read the bills upon which they were about to vote.[15]

Representative Hughes offers no evidence that such legislators exist today. Although Representative Hughes alleges that the bills are being read "at an unintelligible speed," R. 5, R.E. 5, he does not allege that any Member is unable to understand any measure awaiting a vote. The uncontradicted affidavit of Andrew Ketchings, the Clerk of the House, explains that every Member is provided with electronic equipment which allows instantaneous access to the text of every bill,

[15] The authorities cited in this paragraph address Justice King's third and fourth questions concerning the purpose of § 59. R. 40, R.E. 32.

and that paper copies are provided on request. R. 16-17, R.E. 15-16.[16] The House, then, provides every Member with the resources necessary to understand every bill awaiting a vote.

Speaker Gunn does not contend that changed circumstances have relieved him from his oath to enforce § 59. Rather, he contends that the practice of mechanical reading is consistent both with the textual command of § 59 and with the oath he took. Moreover, the chosen method of compliance with § 59 in no way contravenes the "spirit of the Mississippi Constitution," R. 5, R.E. 5, because the Framers' purpose of informing legislators is fully met. Certainly, it cannot be said that "the legislative process suffered substantial harm from" Speaker Gunn's method of enforcement of § 59. *Tuck*, 798 So. 2d at 408.[17]

This Court's precedents, then, dictate deference to Speaker Gunn's judgment in this matter. This Court should remember that, while Speaker Gunn has primary responsibility for coordinating the business of the House, he is not the final authority. Under House Rules, any Member can raise a point of order, and the Speaker's ruling can be appealed to the entire House. It is at least possible that the need that § 59 was designed to meet could arise again, for instance, should the House's computers crash or its copiers break down. This Court should treat Speaker Gunn and the entire House "with due respect and without distrust," *State ex rel. Collins*, 64 So. at 469, by having confidence that § 59 in such circumstances would be applied so as to achieve its purpose.

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[16] Indeed, the provision of paper copies is mandated by Rule 78. "No bill or resolution shall be considered by the House unless members have been furnished copies thereof, except by unanimous consent."

[17] By contrast, alternative methods of compliance would have impeded the business of the House. Justice King's fifth, sixth, and seventh questions concern alternative approaches to § 59. R. 40, R.E. 32. The Convention understood that, historically, "the bill was read at length by the clerk in the hearing of the house." Cushing at 831. Even in the nineteenth century, however, it was "not the custom to read any bill at length. The necessity for reading is superseded by printing . . . ." *Id.*, at 837. When the Clerk filed his affidavit, the calendar showed seven appropriations bills and 89 general bills pending for consideration. R. 18-25, R.E. 17-24. For the Clerk to have read all of those bills would have made it impossible for the House to have completed its work by the deadline of March 30, 2016. R. 17, R.E. 16.

Under the circumstances disclosed by this record, the purpose of § 59 has been achieved, and § 59 is being enforced according to its literal terms. This Court should reject Representative Hughes's position and order the dismissal of his petition.

III. IF REACHED, THE CIRCUIT COURT ERRED IN ENTERING A TEMPORARY RESTRAINING ORDER FOR PROCEDURAL REASONS, AS WELL AS SUBSTANTIVE REASONS THAT REQUIRE THE DISMISSAL OF THE PETITION.

As demonstrated above, there should be no need for this Court to address the merits of the decision of the Circuit Court to grant a temporary restraining order against Speaker Gunn. In the first place, the Circuit Court had no jurisdiction to address the internal affairs of the House of Representatives. In the alternative, if jurisdiction existed, the Court should have deferred to the reasonable judgment of Speaker Gunn in the application of § 59 of the Constitution. Only if this Court rejects both of those arguments is there a need to reach the merits of the petition filed by Representative Hughes.

For procedural reasons, the Circuit Court plainly erred in granting the temporary restraining order. This Court has already dissolved that order by its order of May 24, 2016. Because appeals from TROs rarely arise, this Court should take this opportunity to explain the reasons for its decision. Moreover, the petition filed by Representative Hughes lacks all substantive merit. Because that petition fails to state a claim, the Circuit Court erred in granting any relief.

A. Both the petition and temporary restraining order fail to satisfy the requirements of Rule 65(b).

Rule 65(b) imposes unambiguous requirements on both the applicant for a temporary restraining order and upon the court which chooses to grant such an order without notice to the adverse party, as the Circuit Court did here. The applicant must cause it to "appea[r] from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in

opposition." Moreover, he must "certif[y] to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required." Representative Hughes wholly disregarded these requirements.

First, he has not filed a complaint, verified or otherwise. According to M.R.C.P. 3(a), "A civil action is commenced by filing a complaint with the court." Representative Hughes has failed even properly to commence a civil action, much less to show himself entitled to relief. Second, while his sworn petition attempts to allege irreparable harm in conclusory terms, R. 5, R.E. 5, he makes no effort to explain why he could not have given Speaker Gunn notice before seeking relief from that supposed harm. Finally, he fails to certify that he made any effort whatsoever to give notice to Speaker Gunn.

The Court likewise disregarded the requirements of Rule 65(b) that its temporary restraining order "shall define the injury and state why it is irreparable and why the order was granted without notice." The brief order, R. 8, R.E. 7, gives no explanation whatsoever of the injury the Court believed itself to be addressing. It says nothing about why the order was granted without notice. Its failure to comply with the plain language of Rule 65(b) is apparent on its face.

Few appellate decisions address the consequences of failure to comply with these unambiguous procedural requirements. This is because temporary restraining orders are not automatically appealable in either state or federal court, and they must be reviewed, if at all, under extraordinary appellate procedures, such as those invoked here by Speaker Gunn under M.R.A.P. 5.

Nevertheless, the Supreme Court of the United States has directly addressed the constitutional underpinnings of these requirements. In *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968), the Court reviewed a 10-day temporary restraining order issued by a Maryland court under Maryland law. That 10-day order, issued without notice, was

affirmed by the highest appellate court of Maryland. *Id.*, at 177. The Supreme Court of the United States found the issue not to be moot, *id.*, at 179, and ruled the issuance without notice to be unconstitutional:

> There is a place in our jurisprudence for ex parte issuance without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

Id., at 180. Just as the Supreme Court of the United States reversed the Maryland judgment in that case, *id.*, at 185, this Court likewise has dissolved the temporary restraining order issued by the Circuit Court. R. 30, R.E. 27.

Most importantly, injunctive relief may be granted without a trial on the merits only under the most unusual of circumstances. Four elements must be established:

> (i) there exists a substantial likelihood that the [movant] will prevail on the merits; (ii) the injunction is necessary to prevent irreparable harm; (iii) the threatened injury to the [movant] outweighs the harm an injunction might do to the [opposing party]; and (iv) granting a preliminary injunction is consistent with the public interest.

Advisory Committee Note to M.R.C.P. 65, quoting *Littleton v. McAdams*, 60 So.3d 169, 171 (Miss. 2011). Representative Hughes has not alleged these four elements, and he cannot prove them.

For reasons explained in Part II above and Part III.B hereafter, there is no likelihood that Representative Hughes will prevail on the merits, because he has failed to state a proper claim for relief. In any event, he cannot have been entitled to a temporary restraining order because, on this record, the harm to Speaker Gunn and to the House of Representatives clearly outweighs any supposed harm to Representative Hughes. Under these circumstances, injunctive relief is clearly not consistent with the public interest.

Tuck not only requires deference to the Speaker's procedural rulings, but it also demonstrates that Representative Hughes and other Members cannot have been damaged by the manner in which bills have been read on the Floor of the House. There is no allegation that any member lacks understanding of the substance of bills, and there is affirmative proof that copies are available to all Members at all times. This Court found similar facts to be decisive in *Tuck*:

> They do not suggest that they or other senators were uninformed as to the text of either the bill or conference report or that they had not been distributed; nor do they argue that there was confusion or misunderstanding of those texts or their import.

798 So. 2d at 408. Representative Hughes's attempted allegation of irreparable injury in paragraph 8 of his petition, R. 5, R.E. 5, is stated in the sort of "general terms," *id.*, at 409, found defective by this Court in *Tuck*. Because Representative Hughes does not and cannot allege that he and his colleagues do not or cannot understand the bills being read on the House floor, *Tuck* precludes a finding of irreparable injury.

For all of these reasons, the procedural prerequisites to the entry of a temporary restraining order have not been met. This Court properly dissolved that order by its ruling of May 24, 2016.

B. Speaker Gunn is in full compliance with § 59.

Of course, the principal reason why the Circuit Court cannot grant any relief to Representative Hughes is that he has failed to state a claim. On the basis of the facts to which Representative Hughes has sworn in his petition, Speaker Gunn is in full compliance with the requirements of § 59 of the Constitution.

As Part II above explains, *Tuck* requires the courts to defer to Speaker Gunn's interpretation and application of rules of internal procedure, whether found in the Constitution or adopted by the House itself. However, even without affording the deference required by *Tuck*, there can be no doubt that Speaker Gunn has acted consistently with the Constitution.

Section 59 provides that "every bill shall be read in full immediately before the vote on its final passage upon the demand of any member." Representative Hughes admits under oath in paragraph 6 of his petition that the words of each bill are being read on the floor of the House. R. 5, R.E. 5. That is all that the language that the Constitution requires. Speaker Gunn is acting consistently with the Constitution and with his oath.

It might be possible that circumstances could arise in which compliance with the literal words of § 59 would not achieve the purposes envisioned by the sovereign people in adopting that language. That case is not now before this Court. On the sworn evidence before this Court, Speaker Gunn has acted properly, and Representative Hughes is entitled to no relief.

CONCLUSION

This Court has already properly dissolved the temporary restraining order issued by the Circuit Court. For the reasons set forth herein, this Court should now order the Circuit Court to dismiss Representative Hughes's petition, after resolving Speaker Gunn's pending request for fees and expenses. R. 14, R.E. 13.

Respectfully submitted,

PHILIP A. GUNN, Appellant

BY: *s/Michael B. Wallace*
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CERTIFICATE OF SERVICE

I, Michael B. Wallace, do hereby certify that I have this day caused to be delivered the foregoing pleading or other paper to the following:

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Honorable Winston L. Kidd (Via U.S. Mail)
P. O. Box 327
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THIS, the 7th day of June, 2016.

s/Michael B. Wallace
MICHAEL B. WALLACE